No. 9409.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BANK OF TEHACHAPI (a corporation),

Appellant,

vs.

CUMMINGS RANCH, INC. (a corporation), a Bankrupt,

Appellee.

APPELLEE'S REPLY BRIEF.

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STATEMENT OF THE CASE.

Since the statement of the case by the appellant is somewhat confused chronologically in the facts which it states which finds some support in the record, appellee outlines the history of the matter in so far as it is apparent from an examination of the transcript of the record upon the appeal.

Upon the 2nd day of February, 1939, Samuel Taylor, the Conciliation Commissioner for the County of Kern, State of California, of the United States District Court, made an Order based upon evidence that had been introduced prior thereto at hearings at Bakersfield, California, and upon the report of the appraiser. [Tr. pp. 2-4.]

(NOTE: "Tr." as used by appellant apparently referred to the pages of the original typewritten transcript, which is set forth in brackets throughout the printed transcript, and "Tr." as used in this brief shall refer to the pages of the printed transcript of the record as they appear in the above entitled appeal.)

No form of appeal from the said Order of the Conciliation Commissioner appears in the record, but on the 2nd day of March, 1939, the United States District Court for the Southern District of California, Northern Division, with the Honorable Leon R. Yankwich, Judge presiding, made an Order, apparently based upon some Petition or Petitions by the appellants, which reversed the Orders of the said Conciliation Commissioner of January 20th, 1939, and of February 2nd, 1939. [Tr. p. 7.] No Order of January 20th, 1939, appears in the record. Said Order dated March 2nd, 1939, of the said Court further required a reappraisal of the property and for the Commissioner to take additional evidence as to the reasonable rental value of the property and to take additional evidence at the same time and place as to the matter of a supervisor to supervise the care of the cattle under the Order of the Court, and to cause the sale of sufficient cattle to bring at least $10,000.00 net to the appellant Bank of Tehachapi on or before the 15th day of May, 1939. [Tr. pp. 7-8.] Thereafter, and on the 18th and 25th days of March, 1939, at Bakersfield, California, before the said Conciliation Commissioner, with all parties appearing, hearings were had and evidence was received and the new

report of the appraiser was received and filed pursuant to the said Order and Judgment of March 2nd, 1939, by Judge Leon R. Yankwich [Tr. pp. 20-24]; and thereafter, and on April 5th, 1939, the said Conciliation Commissioner made an Order in writing entitled "Order of Conciliation Commissioner Approving Appraisal and Fixing Rental". [Tr. pp. 20-24.] A Petition for Writ of Review, dated April 4th, 1939, the day prior to the making of the Commissioner's "Order Approving Appraisal and Fixing Rental" in the above entitled cause was filed in the District Court on May 9th, 1939. [Tr. p. 15.] On the 9th day of May, 1939, the said appellant also filed an additional instrument entitled "Petition for Writ of Review", which was dated April 19th, 1939 [Tr. pp. 16-26], and on May 6th, 1939, the said Conciliation Commissioner executed his certificate in the above entitled cause, which was also filed on May 9th, 1939. [Tr. pp. 26-27.]

Thereafter, and on the 11th day of September, 1939, a hearing was had before the Honorable Leon R. Yankwich upon the matters referred to in the said Petitions for Writs of Review of April 4th and April 19, 1939. [Tr. pp. 28-29.] On the 23rd day of October, 1939, the said Honorable Leon R. Yankwich made his Order, Judgment and Decree in writing which was filed in the above entitled matter on said day [Tr. pp. 28-31], and said Order and Judgment, in short, expressly confirmed the said Order of the Conciliation Commissioner of April 5th, 1939, and the Court further found in said Order and Judgment that the Commissioner had complied with each and every of the

provisions of the Order of the said Court of March 2nd, 1939, and had taken the evidence as required by said Order and said Order further found that cattle had been sold by the appellee for a net sum of $10,404.00, all of which had been paid over by the said Conciliation Commissioner to the said appellant Bank of Tehachapi to apply upon the principal of the promissory note of the appellee to the said appellant Bank, and which said Judgment further denied the Writs of Review of April 4th, 1939 and April 19th, 1939, and denied the Petition and Motion of appellant to foreclose on the chattel mortgage. [Tr. pp. 28-31.]

Thereafter, and on the 24th day of November, 1939, the appellant filed a Notice of Appeal in the above entitled cause, a copy of which said notice was served upon the appellees on the 6th day of December, 1939. [Tr. pp. 31-32.]

The record contains no transcript of the testimony or exhibits of the hearings of March 18th and March 25th, 1939, before the Conciliation Commissioner, which said hearings and the testimony and exhibits introduced therein were the basis for the said "Order of Conciliation Commissioner Approving Appraisal and Fixing Rental" [Tr. pp. 20-24] from which the Petition for Writs of Review were taken to the District Court, nor does the record contain any transcript of the proceedings of September 11th, 1939, before the Honorable Leon R. Yankwich, which said proceedings and said Order of the Conciliation Commissioner, dated April 5, 1939, are the basis of the Judgment and Order dated October 23rd, 1939, from which

this appeal has been taken. The only transcripts or summaries of the evidence in the record are of a portion of the hearings before the Conciliation Commissioner of November 19th, 1938 [Tr. pp. 34-72], and of November 22, 1938 [Tr. pp. 73-80] and of January 20th, 1939. [Tr. pp. 80-90.] Each of said hearings were prior to the Order and Judgment of the District Court of March 2nd, 1939 [Tr. pp. 4-8], reversing the Orders of the Conciliation Commissioner and requiring the Commissioner to have a reappprаisal and to take additional evidence of the rental value and to make a new order thereon, and to take evidence as to the need for a supervisor, and to cause sufficient cattle to be sold to net appellant Bank at least $10,000.00. [Tr. p. 7.]

The hearings held thereafter on March 18th and 25th, 1939 [Tr. pp. 20-21] and pursuant to said Order of the District Court, are nowhere referred to by appellant in any of the proceeding, either before this Honorable Court, or the District Court.

ARGUMENT.

The Order, Judgment and Decree of the United States District Court for the Southern District of California, Northern Division of October 23rd, 1939, from which the appellants are appealing [Tr. pp. 28-32] must be affirmed for,

I. The Stated Grounds of Appeal Are Insufficient to Justify Reversing the Judgment and Order of October 23rd, 1939.

II. The Stated Grounds for the Appeal From the Said Judgment and Order Are Not Supported by the Evidence.

I.

The Stated Grounds of Appeal Are Insufficient to Justify Reversing the Judgment and Order of October 23rd, 1939.

(1) The First Four "Specifications of Error" of the Five Stated Specifications Were Not Presented in the Court Below and Find No Support in the Record.

The Specifications of Error numbered 1 to 4 inclusive (App. Op. Br. pp. 5 and 6) do not refer to any of the matters mentioned in any of the Petitions for Writ of Review hereinbefore filed by the appellant. Specifications numbered 1, 2, 3 and 4, refer to the finding of the Court that the appellee had complied with the prior Order of

March 2nd, 1939, requiring the said appellees to sell sufficient cattle to raise not less than the sum of $10,000.00 net to be paid to the appellant Bank on or before May 15th, 1939 [Tr. pp. 6-7], and said Specifications are based upon the contention stated therein that no evidence was before the District Court as to the payment of said $10,000.00.

No denial is made that said money was paid, but appellant relies upon the technical ground that no *evidence* was before the District Court at the time of the hearing of September 11th, 1939, that the money had been paid on or before May 15th, 1939, as required in the Order of March 2nd, 1939. It has been previously pointed out that no transcript has been furnished of the proceedings before Judge Leon R. Yankwich of September 11th, 1939, or the proceedings of March 18th and March 25th, 1939, before the Conciliation Commissioner, which said latter proceedings were specified in the Order of April 5th, 1939, of the Conciliation Commissioner to be the basis of said Order [Tr. pp. 20-21] and now because of the neglect of the appellant to produce a transcript of said proceedings, or any of them, they seek to reverse the Order of the District Court.

It is elementary that the burden is upon the one urging a Writ of Review from an Order of a Conciliation Commissioner, and upon an appellant appealing from the Judgment of the District Court, in relying upon insufficiency of the evidence, to produce the evidence so that the District

Court in the first instance and the United States Circuit Court in the latter instance, may determine if there is any reasonable basis for the said Order or Orders;

In Re Harris, C. C. A. 78 Fed. (2d) 849;

Bank of Eureka v. Partington, C. C. A., 91 Fed. (2d) 587,

and further, that said objections mentioned in Specifications 1, 2, 3, and 4, were not presented to the District Court and they are not reviewable on appeal.

Hill v. Douglas, 78 Fed. (2d) 851;

Harold Lloyd v. Witwer, C. C. A. 65 Fed. (2d) 1, 15.

Nor do said specifications comply with subsection (e) of Rule 20 of the Rules of Practice of the United States Circuit Court of Appeals, for the Ninth Circuit.

No reference is had to the pages of the record where said "Assignments of Error" appear. Nor, separately, does the "Argument" in the appellant's opening brief comply with another portion of said subsection (e) of said Rule 20, in that the requirement, "such assignment of error shall be printed in full preceding the argument addressed to it", is not complied with, and no "Assignments of Error" appear preceding appellant's "Argument". (App. Op. Br. pp. 15-20.) Nor is the subject matter of the argument related to said Specifications of Error.

Section (f) of Rule 20, of the Rules of Practice of the United States Circuit Court of Appeals for the Ninth

Circuit, with reference to the requirement that a reference to the page of the record relied upon in support of each point be set forth, is violated as a uniform practice throughout the appellant's opening brief. Yet in each of such instances appellee has searched through the transcript carefully in order to ascertain whether the record supports those portions of the brief and points discussed therein, and has found no support in the record for such statements or points to which no reference to the record is made in appellant's opening brief. Appellee will not burden the Court by pointing out each of said instances but will only point out some of them during the course of the argument.

(2) The Insolvency of the Bankrupt or Its Ability to Rehabilitate Itself Is Not a Proper Matter for Consideration on This Appeal.

The ability of a bankrupt proceeding under subsection S of section 75 of the Bankruptcy Act to rehabilitate itself is not a matter for consideration upon a petition to dismiss proceedings. The opening brief of the appellant directs its argument principally to the contention that it is impossible for the appellee to rehabilitate itself within a three year period or within any other time. (App. Op. Br. pp. 6-11, 12-13, 15-18.) Assuming solely for the purpose of presenting said point, that the appellee is hopelessly insolvent and unable to rehabilitate itself, but in nowise conceding said point, the matter has been determined by the case of *Bartels v. John Hancock Mutual Life Insurance*

Company, C. C. A. 100 Fed. (2d) 813, and affirmed in 60 S. Ct. 221, 84 L. Ed. ..... The Supreme Court has expressly overruled the statement in the note in the case of *Wright v. Vinton Branch,* 300 U. S. 440, 462, 57 S. Ct. 556, 561, 81 L. Ed. 736, 112 A. L. R. 1455, to the effect that the proceedings could be dismissed because of a lack of reasonable probability of financial rehabilitation of the debtor. (*Bartels v. John Hancock etc.,* 60 S. Ct. 221, 223 and Note 3 on page 223.) As the Circuit Court in said case so aptly put it, the act is expressly extended to those who are insolvent, and further states "That he has no equity in his property but is actually insolvent is no bar". (*Bartels v. John Hancock, etc.,* 100 Fed. (2d) 813, 815, 816, and subsection (c) 11 U. S. C. A. Sec. 203 (c). See also *Federal Land Bank of Springfield v. Hansen,* 109 Fed. (2d) 139. *Paradise Land Company v. Federal Land Bank at Berkeley,* 108 Fed. (2d) 832. *Cook v. Federal Land Bank at Berkeley,* 108 Fed. (2d) 185.) The latter two cases reversed orders of the District Court which had required a dismissal of proceedings because the debtor was hopelessly insolvent.

II.

The Stated Grounds for the Appeal From the Said Judgment and Order Are Not Supported by the Evidence.

In appellee's Statement of the Case in this brief, it has been pointed out that the record contains no transcript or statement of the testimony of the hearings which form the basis of the Conciliation Commissioner's Order of April 5, 1939, in this matter, and of the subsequent Judgment and Order of Judge Yankwich approving said Order, from which Judgment and Order the appeal is taken. In any event, the arguments set forth by appellant are insufficient to set aside the judgment of the District Court. Appellant uses as a premise, its contention that a statement given by the appellee to the appellant in 1923 which showed an indebtedness of $45,250.00 (App. Op. Br. p. 6) and a statement given to said appellant Bank on December 31, 1927, showing an indebtedness of $67,030.00, and a statement of December 31, 1928, showing an indebtedness of $65,180.00, as compared to a claimed indebtedness of $79,249.00 on April 5, 1939, is conclusive of the fact that the appellee is hopelessly insolvent. [App. Op. Br. pp. 6-8; Tr. pp. 47-50.] Appellant carefully avoids reference to the fact that the real property consisting of the 5,009 acre ranch [Tr. p. 36] is exactly the same ranch as is set forth in the various statements and the live stock is approximately the same in amount and value on the date of appraisal in April of 1939, as in the statements of 1927 and 1928. [Tr. pp. 21-22, 80.] The loan in question was made and the chattel mortgage was executed in 1934. [Tr. pp. 52-56.] No claim is made that any fraud was practiced or misstatement was made at the time the note

and chattel mortgage of November, 1934, was executed and the record reveals no comparison between a statement of 1934 and of 1939. In the interim between the periods of the statements of 1927 and 1928 and the appraisal of April, 1939, this country has undergone one of the severest depressions and the greatest reductions in property value in the history of this nation, of which depression, judicial notice has been taken by almost every court. (*Nev.-Cal. Co. v. Imperial Irr. Dist.,* 85 Fed. (2d) 886; *Alexander v. State Capital Company,* 9 Cal. (2d) 304, 70 Pac. (2d) 619.)

The statement of appellant on page 8 of its opening brief that the sum of $33,688.00 is owing to it by appellee, is nowhere supported by the record either at the place cited by appellant or elsewhere. The testimony of Albert Ancker, the president of the appellant Bank, was that the sum of $27,735.00, principal and $2,193.00 interest (which totals the sum of $29,928.00) was owing in October and November of 1938 [Tr. pp. 65-66]; the chattel mortgage of appellants provides that it is security for the payment of $24,650.00, and such additional sums not to exceed $4,000.00, as shall be evidenced by additional notes, and no additional notes appear in the record or are referred to in the testimony. [Tr. pp. 52-54.] In other words, the indebtedness owed to the appellant by appellee is either $29,928.00 or $24,650.00, and in either case a cash payment had been made after the commencements of these proceedings and prior to May 15, 1939, of $10,404.00, upon the principal of said indebtedness. [Tr. p. 30.] The filing of this appeal on October 23, 1939, after such substantial payment on the indebtedness cannot help but cause one to recall the language of the Circuit Court of Appeals

in the case of *Bartels v. John Hancock Mutual Life Insurance Company,* 100 Fed. (2d) 813 at 815, wherein the court points out "the social evil of the rich becoming ever richer and the poor poorer" would be aggravated by permitting creditors to force the sale of farms or farm property because of unprofitable years due to a widespread depression.

The loose statement by appellant, without any reference to the record,

> "There is of course, no doubt that the Court appraisement is too high in a great many respects, and there is a lot of interest accumulation to be added to some of the indebtedness, which will make the indebtedness larger" (App. Op. Br. p. 8),

is not supported by any evidence of the value of the property presented before the Commissioner or the Court to rebut the appraisement nor was there any testimony of interest accumulation other than that immediately hereinbefore set forth. The next statement as to annual taxes is not supported by the record nor the next statement of appellant as to expense of feeding the cattle. (App. Op. Br. pp. 8-9.) On the contrary, the record shows that for the past twenty-five or thirty years there has not been any necessity for feeding the cattle, in other words, that they graze on the land. [Tr. p. 62.]

Appellant's point "I" under Points of Law on page 11 of its opening brief is not supported by the record for the reasons set forth hereinbefore that appellant has not produced any portion of the record of the hearing before the District Court on September 11, 1939, as to the payment of $10,404.00, on or before May 15, 1939.

Appellant's point "II" (App. Op. Br. p. 12) appears to be merely a confirmation of the right of the appellee to retain possession. There is no question but what the rental fixed by the Commissioner and approved by the Court is reasonable since the amount is $6,000.00 per year in addition to the initial payment of $10,404.00.

Appellant's point "III" (App. Op. Br. p. 12), that where rehabilitation is not possible, the Court may dismiss, has been answered.

Appellant's point "IV" (App. Op. Br. p. 13), that no emergency is existing, is not supported by any reference to the record. Testimony does appear in the record that some three or four years prior to the time of the hearing in this proceeding, the cattle business was in very bad shape and the government killed a lot of cattle. [Tr. p. 75.]

Appellant's point "V" (App. Op. Br. p. 14), contending that the rental order deprives the bank of a portion of its lien, because the taxes and upkeep of the property are to be paid first from the rent, has been answered by the Supreme Court in the case of *Adair v. Bank of America,* 58 S. Ct. 594, 303 U. S. 350, 82 L. Ed. 889.

In addition, each of the foregoing points excepting only point "I", were not referred to by appellant in its Specifications of Error. (App. Op. Br. pp. 5-6.)

Appellant's "Argument" (App. Op. Br. pp. 15 to 18), is all to the same effect, that a dismissal of the proceedings should be had because of a claimed inability of the debtor to rehabilitate. This matter has been gone into before, but the so-called "Argument" cannot be passed without some reference to some of the misstatements contained therein.

Throughout the whole of the argument, only three references are made to the transcript; the first is in support of the statement that the income of the appellee for the years of 1934 to 1938 inclusive, has been $3300.00 a year excepting only a little income from the sale of chickens and a little revenue from the sale of firewood not exceeding the sum of $100.00 a year, citing transcript page 99 (App. Op. Br. p. 16). Since the printed transcript only goes to page 97, it is apparent that appellant is referring to the bracketed number "99" on page 74. That portion of the transcript, summarized, shows that the appellee did not sell any of its cattle during the year 1938 for the reasons set forth by its president, Mr. Cummings, on page 75 of the transcript, that he was trying to bring the herd up to a certain number so he could brand 175 to 200 head of cattle per year and be justified in selling 150 for beef; and said testimony on page 74 of said transcript, in reference to the matter of chickens, shows that the living expenses of the persons connected with the corporation, has been received from the raising of chickens and that the revenue turned into the corporation from the sale of wood has amounted to over $100.00 per year. [Tr. p. 74.]

Appellant's only other statements in the whole of its arguments which contains any reference to the transcript, is that it is necessary for the appellee to rent land to graze its cattle in the winter at an annual rent of $1184.00 and that it pays a caretaker $50.00 a month plus his food, to assist in the care of the cattle. (App. Op. Br. pp. 15-20.)

The statement of the appellant on page 16 of appellant's opening brief, without any reference to the transcript, that the financial condition of the appellee has been steadily growing worse, except for the year (not stated) when a creditor took a lesser amount in settlement of an indebtedness, and the further statement that the debts in 1928, increased and the assets in 1928, decreased, in comparison with 1927, are both not supported by the record, but the record reveals them to be false. A comparison of the statement of the appellee as of December 31, 1927 [Tr. p. 49], omitting therefrom, the capital stock of $60,000.00 as a liability, shows assets in said statement of $127,-062.35, less a book deficit because of the capital stock of $12,636.25, or gross assets of $114,426.10, and liabilities of $67,062.35; the balance sheet of December 31, 1928, reveals [Tr. p. 50] assets of $125,180.12, less a book deficit of $10,754.12, or assets of $114,426.10 and liabilities of $65,180.12, which shows that the assets were the same in 1928 as in 1927, and the liabilities were reduced one year later by approximately $2,000.00.

The next statement in appellant's opening brief at page 16, that the company suffered an average loss of $4,000.00 per year from 1923 to 1928, is both immaterial, remote, and not supported by any reference to the record or by anything in the record. A comparison of balance sheets for the years of 1923 and 1928, is no criterion of the profits or loss, for the appellee may have enjoyed profits or suffered losses in the interim from the operation of the corporation, since other factors unrelated to business

profits such as a distribution of assets or distribution of dividends to members of the corporation individually, among many other things could cause such difference.

The next statement on page 16 of appellant's opening brief, is also not supported by any reference to the record, no evidence appears in the record that the income from 1934 to 1938 from the sale of cattle has been approximately $16,500.00, although it does appear in the record that during the year of 1938, no appreciable amount of cattle were sold, in order to build up the herd to an economically desirable number. [Tr. pp. 74-75.]

Appellant's next statement that over $33,000.00 is due to the appellant (App. Op. Br. p. 16), has been referred to in detail hereinbefore in this brief and it is clear that said sum does not exceed more than $30,000.00, less the payment on the principal of $10,404.00. [Tr. pp. 30, 65, 66.] At the top of page 17 of appellant's opening brief, and at the bottom of page 18, appellant has made the statement that they have offered to take and are willing to take a "substantial discount" without any reference to the record and the record will reveal no such offer. Appellee has with difficulty restrained itself from going outside the record to show appellant's real attitude in so far as its willingness to take any discount whatsoever is concerned. It would unduly prolong this brief to continue to refer to the numerous instances in the short argument of appellant wherein appellant makes purported reference to the facts without either a citation of the record in support thereof, or without any support in the record whether cited or not.

The Record Not Only Does Not Show That the Bankrupt Cannot Rehabilitate Itself But Affirmatively Shows Beyond Question That the Bankrupt Can and Should Rehabilitate Within the Period Provided by Law.

The president of the bankrupt corporation testified that it is feasible to sell 150 head of cattle per year and that it was his intention to sell 108 head for a gross of $8,000.00 to $10,000.00 [Tr. pp. 75-76], and further testified that there are 775 head of cattle available. [Tr. p. 80.] Russell Hill, the witness for *appellant,* who testified that he is managing the ranch adjoining that of the bankrupt corporation, and has been in the ranching business for thirty years and has been acquainted with the property of the appellee for thirty-five years [Tr. pp. 81-82], further testified that the cattle should net $10.00 a head clear per year for each of said head of cattle [Tr. p. 87], which, on the basis of 775 head, should allow a net profit of $7750.00 from the cattle alone. In addition to the living expenses being taken care of by the chickens on the ranch [Tr. p. 74], the ranch has a contract that calls for $8,000.00 a year for the sale of timber thereon and the testimony shows that the ranch has the equipment in its lumber mill capable of handling such timber. [Tr. pp. 76-77.]

Conclusion.

In the instant case, we have one creditor complaining because the proceedings are not dismissed, although after the proceedings had commenced and prior to the appeal, it was paid more than one-third of its obligation; and although a rental order has been made providing for an annual payment of $6,000.00, and although the income of the debtor varies somewhere between $7,750.00 and $17,000.00 per year.

Appellee, whose income is derived from cattle raising, poultry raising, and timber, presents a case of the very type of farmer and the very class of person for whom the beneficial provisions of the Frazier-Lemke Act were enacted.

Wherefore, it is respectfully submitted that the Order, Judgment and Decree appealed from, should be affirmed and sustained.

Respectfully submitted,

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